IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

WP(C).No. 10414 of 2007(M)

AGAINST THE ORDER DATED 12/03/2007 IN I.A NO. 750/2007 IN OS.818/2000 OF MUNSIFF COURT, THIRUVALLA

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PETITIONER: 2ND PETITIONER/2ND PLAINTIFF

RAJAPPAN, AGED 65 YEARS, S/O.RAJAPPAN,
MAVUMKAL HOUSE, KAKKANATTUKUZHIL,
ANJILITHANM MURI, KUNNATHANAM VILLAGE,
MALLAPPALLY TALUK.

BY ADV. SRI.P.HARIDAS

RESPONDENTS: COUNTER PETITIONERS/DEFENDANTS:

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1. **NJANAMMA THANKAMMA, MAVUMKAL HOUSE,**
   ANJILITHANM MURI, KUNNATHANAM VILLAGE,
   MALLAPPALLY TALUK.

2. **PRASANNAN NAIR,**
   S/O.NJANAMMA THANKAMMA, MAVUMKAL HOUSE,
   ANJILITHANM MURI, KUNNATHANAM VILLAGE,
   MALLAPPALLY TALUK.

3. **OMANA, MAVUMKAL HOUSE,**
   MANJILITHANM MURI, KUNNATHANAM VILLAGE,
   MALLAPPALLY TALUK.

4. **JOHNKURIAN, ALIAS KOCHUMON,**
   VALIYAMANNIL HOUSE, ANJILITHANM MURI,
   KUNNATHANAM VILLAGE, MALLAPPALLY TALUK.

5. **BINU JACOB,**
   ELAVUMMOOTTIL HOUSE, MAVUMKAL HOUSE,
   ANJILITHANM MURI KUNNATHANAM VILLAGE,
   MALLAPPALLY TALUK.

**6. K.T.KURIAN, KANIYANTHARA HOUSE,
MAVUMKAL HOUSE, ANJILITHANM MURI,
KUNNATHANAM VILLAGE, MALLAPPALLY TALUK.**

**BY ADV. SRI.ABRAHAM SAMSON -- R1 TO R3, R5 AND R6
SMT.LOVELY SAMSON**

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 24/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C) NO: 10414/2007 M

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE PLAINT IN OS NO. 818/2000 BEFORE THE MUNSIFF COURT, THIRUVALLA.

EXT.P2. COPY OF THE ADDITIONAL WRITTEN STATEMENT IN OS NO. 818/00 BEFORE THE MUNSIFF COURT, THIRUVALLA.

EXT.P3. COPY OF THE COMMISSION APPLICATION IN OS NO. 818/00 BEFORE THE MUNSIFF COURT, THIRUVALLA.

EXT.P4. COPY OF THE ORDER IN IA NO. 750/07 IN OS NO. 818/00 DT. 12/3/07 IN THE MUNSIFF COURT, THIRUVALLA.

EXT.P5. COPY OF THE COMMISSION APPLICATION FILED BY THE PETITIONER BEFORE THE MUNSIFF COURT.

RESPONDENT'S EXHIBITS

EXT.R2A. COPY OF THE AMENDMENT PETITION FILED ON 5/2/07 FILED BY THE PETITIONER BEFORE THE MUNSIFF COURT, THIRUVALLA IN OS NO. 18/00.

EXT.R2B. COPY OF THE DETAILED OBJECTION TO THE AMENDMENT PETITION WAS FILED ON 12/2/2007.

EXT.R2C. COPY OF THE COMMISSION REPORT IN I.A. NO. 1340/00 IN OS NO. 783/00 DT. 10/11/00.

EXT.R2D. COPY OF THE COMMISSION REPORT IN IA NO. 3777/00 IN OS NO. 818/00 DT. 7/12/00.

EXT.R2E. COPY OF THE COMMISSION REPORT IN I.A NO. 556/01 IN OS NO. 818/00 DT. 25/5/01.

EXT.R2F. COPY OF THE COMMISSION REPORT IN I.A NO. 696/01 IN OS NO. 818/00 DT. 7/7/01.

EXT.R2G. COPY OF THE JUDGMENT OF THIS COURT IN WPC NO. 23693/06 DT. 18/1/2007.

EXT.R2H. COPY OF THE COMMISSION APPLICATION FILED BY THE PETITIONER AS I.A NO. 780/07.

True copy

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M.N.KRISHNAN, J

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W.P.(C) No.10414 OF 2007

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Dated this the 24th day of October 2007

JUDGMENT

This writ petition is filed to set aside Ext.P4 order. Plaintiffs in the suit moved an application for issuance of a Commission for identification of the property for a proper determination of the case. Defendants resisted the same on the ground that 3 or 4 Commissioners have already visited the property and submitted their plans and reports and there is no necessity for issuance of a fresh Commission. The court below accepted the same and rejected the application. It is against that order the present writ petition is filed.

2. It is submitted that the plaint had undergone an amendment after the trial has commenced and a detailed additional written statement is filed by the defendants. The contention of the defendants appears to be that the alleged pathway claimed by the plaintiffs does not form part and parcel of their property and therefore the plaintiffs are not entitled to any relief. The lie of the pathway is also disputed.

3. In a suit for declaration of easement right, the following facts are to

be established, viz.,(1) the existence of the way, (2) the way passes through the property of the defendants and (3) that the said pathway had been used by the plaintiffs as of right uninterruptedly and peacefully for a statutory period of more than 20 years.

4. It is a fundamental question to be looked into whether the pathway claimed by the plaintiffs runs through the property of the defendants or not. The contention raised by the defendants at least in a half hearted way establish that they are not admitting that the alleged way goes through the property. So, the main ingredient to be looked into and decided by the court itself is in dispute. On the other hand, plaintiffs assert that the way claimed by them runs through the property of defendants 1 to 4. So, prima facie, in order to adjudicate the claim, the fixation of the way and through whose property it runs are very very relevant. If materials are lacking and there is contradictory evidence, the court may not be able to decide the issue properly.

5. Therefore, I feel for a proper resolution of the dispute between the parties, it is necessary that a Commissioner inspects the property and submits a plan wherein he is able to point out whether the alleged pathway claimed by the plaintiffs runs through the property of the defendants as contended by the plaintiffs. For this purpose, it may be necessary to measure

the property of the defendants. I am also informed by the learned counsel for the respondents that much water has flown and evidence had been adduced and there are inconsistent versions given by PW1 and the court is not expected to permit the plaintiffs to fill up the lacuna by issuance of a Commission. There is force in the said contention. But, at the same time, if the adjudication of the question requires it, then the court cannot shut out that evidence. Instead of searching in the dark when it is possible to get materials then it is always desirable that such an attempt is made. So far as the age of the way, etc.etc. are concerned, there are already reports submitted by the Commissioners. So, I feel in the nature of the contentions between the parties, a Commission has to be issued, i.e. by way of remittal to locate and find out whether the pathway claimed by the plaintiffs runs through the properties of defendants 1 to 4 as contended by the plaintiffs. While considering that matter, the Commissioner can very well look into the contentions of defendants and that can be also reported before the court. The Commissioner can clearly demarcate the alleged pathway and give his report on the factum mentioned above. So, for this limited purpose, I feel the Commissioner's report has to be remitted and I direct Sri.Jacob Philip, who has been deputed as a Commissioner on a previous occasion be directed to visit the property and do the work as stated above. If he requires

the assistance of a Taluk Surveyor that also may be provided for. It goes without saying that the expenses have to be met by the plaintiffs and the Commissioner as well as the court should see that unnecessary protraction in submission of the report is not caused for the reason that the matter has almost attained finality. Defendants are also permitted to file a work memo before the Commissioner.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-